A **UTHAYAKUMAR PONNUSAMY v. YAB DATO' SRI NAJIB TUN RAZAK, PERDANA MENTERI MALAYSIA & ORS**

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
MOHD ZAWAWI SALLEH JCA
B AHMADI ASNAWI JCA
[CRIMINAL APPEAL NO: W-09-72-02-2016]
23 SEPTEMBER 2016

C ***CRIMINAL PROCEDURE:*** *Appeal – Competency – Application for miscellaneous criminal application – Absence of intitulement in heading or body of application – Whether application made in exercise of High Court's appellate or revisionary jurisdiction or original criminal jurisdiction – Whether appeal competent*

D ***JURISDICTION:*** *High Court – Procedure – Application for miscellaneous criminal application in High Court – Appellant sought reliefs of mandamus and declaration – Whether reliefs and declaration within jurisdiction of criminal court – Whether application filed pursuant to Criminal Procedure Code – Whether application made in exercise of High Court's appellate or revisionary jurisdiction or original criminal jurisdiction*

E The appellant filed a miscellaneous criminal application ('the application') at the High Court seeking several reliefs against the Prime Minister, the Minister of Home Affairs, the Director General of the Prisons Department Malaysia, the Director of the Kajang Prison, the Attorney General and the Government of Malaysia ('the respondents'). The application was resisted by
F the Deputy Public Prosecutor ('DPP') who raised preliminary objections that: (i) the reliefs or the declaration prayed for by the appellant were not within the jurisdiction of the criminal court; and (ii) there was no intitulement in the application. In response, the appellant submitted that the application ought not to be dismissed summarily on the preliminary objections without a trial for the reasons that: (i) the application was made
G pursuant to the inherent jurisdiction of the court, in particular O. 92 r. 4 of the Rules of Court 2012 ('ROC'); (ii) the application was the first of its kind and since the matter involved serious issues of torture, cruel, inhumane and degrading treatment of the prisoners, the appellant should be given his day in court; (iii) the application was correctly filed in the criminal court as it
H was filed in consequence of his imprisonment for a conviction under sub-s. 4(1) of the Sedition Act 1948; (iv) the court had the judicial powers to deal with his application for declaration; and (v) the absence of the intitulement was a minor irregularity which could be remedied. The Judicial Commissioner found that the High Court had no power to grant the reliefs
I sought by the appellant and hence, upheld the preliminary objections and dismissed the application. Aggrieved, the appellant appealed. The DPP again

raised a preliminary objection on the grounds that the appeal was incompetent and failed to fulfil the requirement of s. 50 of the Courts of Judicature Act 1964 ('CJA'). A

Held (dismissing appeal; affirming order of High Court)
Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court: B

(1) The application herein was silent either in the heading of the application or in its body as to the statute or the rule of court under which the application was made. The application was filed as a miscellaneous criminal application. As the law governing criminal procedure is the Criminal Procedure Code ('CPC'), the appellant must conform to the provisions of the CPC in making the application, *ie*, the reliefs prayed for must fall within the matters allowed under the CPC. However, there was nothing in the CPC to support the application for the reliefs. (paras 16 & 17) C

(2) The appellant was seeking the reliefs of *mandamus* and declaration which reliefs are provided for under the Specific Relief Act 1950 ('SRA'). The SRA pertains essentially to reliefs and remedies for civil action. In criminal proceedings, the correct party to be cited would be the Public Prosecutor. However, the application did not cite the Public Prosecutor as the respondent. Instead, the appellant cited the Government of Malaysia, whereas under sub-s. 21(1) of the Government Proceedings Act 1956, the Government of Malaysia is only named as a party in civil proceedings. In that light, the application was an embarrassing pleading which was liable to be struck out without hearing the merits. (paras 18-20) D E

(3) Due to the absence of any intitulement either in the heading or in the body of the application, it could not be ascertained under which provision of the law was the application made in the High Court. Nonetheless, it was clear that the application was not made in the exercise of the High Court's appellate or revisionary jurisdiction in respect of any criminal appeal decided by the Sessions Court. This was because although the appellant did allude to his conviction and sentence by the Sessions Court for an offence under sub-s. 4(1)(c) of the Sedition Act 1948, this application had nothing to do with the decision of the Sessions Court. The appellant had exhausted his avenues in the High Court and in this court in respect of the sedition case and his sentence had been spent. (para 23) F G H

(4) What was left would be the original criminal jurisdiction of the High Court as provided in s. 22 of the CJA. However, the application did not relate to any of the offences stipulated in paras. (a) and (b) of s. 22. Hence, it was not filed pursuant to the original criminal jurisdiction of the High Court. It followed that the appeal did not fall under s. 50 of the CJA. Further, the appellant's reliance on O. 92 r. 4 of the ROC to I

A argue that the High Court has the inherent jurisdiction to determine the application was misconceived in view of O. 1 r. 2(2) of the ROC. Hence, there was no competent appeal herein which rendered the preliminary objection to be upheld. (paras 24-27)

Bahasa Malaysia *Headnotes*

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Perayu memfailkan permohonan jenayah berbagai ('permohonan') di Mahkamah Tinggi bagi beberapa relif terhadap Perdana Menteri, Menteri Dalam negeri, Ketua Pengarah Jabatan Penjara Malaysia, Pengarah Penjara Kajang, Peguam Negara dan Kerajaan Malaysia ('responden-responden'). Permohonan tersebut dibantah oleh Timbalan Pendakwa Raya ('TPR') yang membangkitkan bantahan awalan bahawa: (i) relif-relif atau deklarasi yang dipohon oleh perayu tidak terangkum dalam bidang kuasa mahkamah jenayah; dan (ii) tiada intitulemen dalam permohonan tersebut. Sebagai jawapan, perayu menghujahkan bahawa permohonan tersebut tidak sepatutnya ditolak terus berdasarkan bantahan awalan tanpa perbicaraan atas alasan-alasan bahawa: (i) permohonan tersebut dibuat menurut bidang kuasa sedia ada mahkamah, khususnya A. 92 k. 4 Kaedah-Kaedah Mahkamah 2012 ('KKM'); (ii) ini adalah kali pertama permohonan sedemikian dibuat dan oleh sebab perkara tersebut melibatkan isu-isu penderaan, kejam, tidak berperikemanusiaan dan layanan sehingga menjatuhkan maruah banduan, perayu perlu diberi peluang didengar; (iii) permohonan difailkan secara betul di mahkamah jenayah kerana difailkan berikutan pemenjaraannya bagi sabitan bawah sub-s. 4(1) Akta Hasutan 1948; (iv) mahkamah mempunyai kuasa kehakiman untuk menangani permohonan deklarasi; dan (v) ketiadaan intitulemen adalah kecacatan kecil yang boleh dibetulkan. Pesuruhjaya Kehakiman mendapati bahawa Mahkamah Tinggi tiada kuasa untuk memberikan relif-relif yang dipohon perayu dan dengan itu, mengekalkan bantahan awalan dan menolak permohonan tersebut. Terkilan, perayu merayu. Sekali lagi TPR membangkitkan bantahan awalan atas alasan-alasan bahawa rayuan tersebut tidak kompeten dan gagal memenuhi keperluan s. 50 Akta Mahkamah Kehakiman 1964 ('AMK').

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Diputuskan (menolak rayuan; mengesahkan perintah Mahkamah Tinggi) Oleh Tengku Maimun Tuan Mat HMR menyampaikan penghakiman mahkamah:

(1) Tiada apa-apa dalam permohonan ini sama ada dalam tajuk permohonan atau kandungannya mengenai statut atau kaedah mahkamah mana yang disandarkan bagi permohonan tersebut. Permohonan tersebut difailkan sebagai permohonan jenayah berbagai. Oleh sebab undang-undang yang mengawal prosedur jenayah adalah Kanun Tatacara Jenayah ('KTJ'), perayu mesti memenuhi peruntukan KTJ apabila membuat permohonan tersebut, iaitu, relif-relif yang dipohon mesti terangkum dalam perkara-perkara yang dibenarkan bawah KTJ. Walau bagaimanapun, tiada apa-apa dalam KTJ untuk menyokong permohonan bagi relif-relif tersebut.

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(2) Perayu memohon relif-relif *mandamus* dan deklarasi, iaitu relif-relif yang diperuntukkan bawah Akta Relif Spesifik 1950 ('Akta'). Akta tersebut adalah, dengan khususnya, berkaitan dengan relif-relif dan remedi-remedi bagi tindakan sivil. Dalam prosiding jenayah, pihak betul yang perlu dinyatakan adalah Pendakwa Raya. Walau bagaimanapun, permohonan tersebut tidak menyatakan Pendakwa Raya sebagai responden. Sebaliknya, perayu menyatakan Kerajaan Malaysia, apabila di bawah sub-s. 2(1) Akta Prosiding Kerajaan 1956, Kerajaan Malaysia hanya dinamakan sebagai pihak dalam prosiding sivil. Berikutan itu, permohonan tersebut adalah pliding mengaibkan yang wajar dibatalkan tanpa merit didengar.

(3) Disebabkan tiada intitulemen sama ada dalam tajuk atau kandungan permohonan, tidak boleh ditentukan di bawah peruntukan undang-undang mana permohonan tersebut dibuat di Mahkamah Tinggi. Walau bagaimanapun, jelas bahawa permohonan tersebut tidak dibuat dalam pelaksanaan bidang kuasa rayuan atau semakan Mahkamah Tinggi berkaitan apa-apa rayuan jenayah yang diputuskan oleh Mahkamah Sesyen. Ini adalah kerana walaupun perayu tidak menyentuh tentang sabitannya dan hukuman oleh Mahkamah Sesyen bagi kesalahan bawah s. 4(1)(c) Akta Hasutan 1948, permohonan ini tiada kaitan langsung dengan keputusan Mahkamah Sesyen. Perayu telah menggunakan kesemua peluangnya di Mahkamah Tinggi dan di mahkamah ini berkaitan dengan kes hasutan tersebut dan hukuman telah pun dijalankan.

(4) Yang tinggal adalah bidang kuasa asal Mahkamah Tinggi seperti yang diperuntukkan dalam s. 22 AMK. Walau bagaimanapun, permohonan tersebut tiada kaitan dengan mana-mana kesalahan yang dinyatakan dalam perenggan (a) dan (b) s. 22. Oleh itu, permohonan tidak difailkan berikutan bidang kuasa jenayah asal Mahkamah Tinggi. Akibatnya, rayuan ini tidak terangkum dalam s. 50 AMK. Selanjutnya, sandaran perayu pada A. 92 k. 4 KKM untuk menghujahkan bahawa Mahkamah Tinggi mempunyai bidang kuasa sedia ada untuk menentukan permohonan adalah satu salah tanggapan berikutan A. 1 k. 2(2) KKM. Oleh itu, tiada rayuan yang kompeten dalam kes ini yang menjadikan bantahan awalan dikekalkan.

Case(s) referred to:

Cheow Chew Khoon v. Abdul Johari Abdul Rahman [1995] 4 CLJ 127 CA ***(refd)***
Ketua Pengarah Imigresen Malaysia lwn. Heng Peo [2007] 2 CLJ 111 CA ***(refd)***
Loh Kooi Choon v. Government of Malaysia [1975] 1 LNS 90 FC ***(refd)***
PP v. Kok Wah Kuan [2007] 6 CLJ 341 FC ***(refd)***
Teh Cheng Poh v. PP [1978] 1 LNS 202 PC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 3, 22, 25(2), 26, 30, 31, 35, 50, 67
Criminal Procedure Code, s. 376(1)
Federal Constitution, arts. 5(3), 8, 121(1), 121(1B), 145(3)
Government Proceedings Act 1956, s. 21(1)
Rules of Court 2012, O. 1 r. 2(2), O. 92 r. 4
Sedition Act 1948, s. 4(1)(c)

For the appellant - In person
For the respondents - Awang Armadajaya Awang Mahmud, Nadia Hanim Mohd Tajuddin & Norinna Bahadun; DPPs

[Editor's note: For the High Court judgment, please see Uthayakumar Ponnusamy v. YAB Dato' Sri Najib Tun Razak, Perdana Menteri Malaysia & Ors [2016] 5 CLJ 523 (affirmed).]

Reported by S Barathi

JUDGMENT

Tengku Maimun Tuan Mat JCA:

Background

[1] The appellant filed a miscellaneous criminal application *vide* a notice of motion ("the application") in the High Court at Kuala Lumpur, seeking for several reliefs against the Prime Minister, the Minister of Home Affairs, the Director General of the Prisons Department Malaysia, the Director of the Kajang Prison, the Attorney General and the Government of Malaysia. They were cited as the first respondent to the sixth respondent, respectively.

[2] The application, as can be seen at pp. 41-48 of the appeal record, was very lengthy. For brevity, we will adopt with modifications the application as summarised by learned DPP in his written submission as follows:

(i) That the first respondent on the advice of the fifth respondent to propose to the Yang di-Pertuan Agong for the setting up of a Royal Commission of Inquiry to be led by the appellant or a human rights lawyer to investigate into the appellant's complaints as written in his book entitled "*Torture in Malaysian Prisons*";

(ii) That all prisoners in the prisons in Malaysia be given equal health care and treatment by specialist just like any other citizen;

(iii) A declaration that the appellant is a political prisoner and the imprisonment of the appellant with other ordinary prisoners without being separated from the Malay and Chinese political prisoners and the instruction that the appellant remove his slippers and sit on the floor while talking to the prison officers who sit on chairs with tables is racist and contrary to art. 8 of the Federal Constitution;

(iv) Various declarations that some of the prison conditions are in breach of the Prison Act 1995, the Prison Regulations 2000 and the Standard Minimum Rules for the Treatment of Prisoners adopted by the First United Nations Congress held at Geneva in 1955;

(v) Various declarations that some general practices in the prison are in breach of art. 5(3) of the Federal Constitution, the Evidence Act 1950, the Legal Profession Act 1976, the Penal Code, the Prison Act 1995, the Prison Regulations 2000 and the Standard Minimum Rules for the Treatment of Prisoners adopted by the First United Nations Congress held at Geneva in 1955;

(vi) That the first and/or the second respondents appoint the appellant or any human rights lawyer as the "Ketua Pengarah Hak Asasi Minima Banduan (U.N.) Malaysia" having the same status, salary and power as the "Ketua Pengarah Jabatan Penjara Malaysia" having office at Ibu Pejabat Jabatan Penjara Malaysia and having the power to receive, investigate and propose appropriate actions to the first and second respondents and/or to lodge police reports as an independent check and balance;

(vii) That two human rights lawyers be appointed as the "Pengarah Hak Asasi Minima Banduan (U.N.) Malaysia" and the "Timbalan Pengarah Hak Asasi Minima Banduan (U.N.) Malaysia" by the first and/or the second respondents having the same status, salary and powers of the "Pengarah" and "Timbalan Pengarah Penjara" and it is compulsory for them to visit and receive complaint in at least one prison block every day and having office at the prisoners waiting area also to be able to receive complaint from family members of the prisoners, lawyers and public especially on weekends and public holidays;

(viii) That "transvestite" prisoner is put in a separate cell to avoid being abused;

(ix) That Muslim prisoners are allowed to perform Friday prayers and to perform prayers facing the "kiblat";

(x) That the fifth respondent prosecutes all individuals that committed criminal act towards the appellant and other prisoners;

(xi) That the respondents abolish the death penalty, life imprisonment, whipping and imprisonment more than 20 years; and

(xii) That the parole program be led by a human rights lawyer.

A **Proceedings In The High Court**

[3] The application was resisted by learned DPP who raised the following preliminary objections:

(i) the reliefs or the declaration prayed for by the appellant were not within the jurisdiction of the criminal court; and

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(ii) there was no intitulement in the application.

[4] In response, the appellant submitted that the application ought not to be dismissed summarily on the preliminary objections without a trial for the following reasons:

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(i) the application was made pursuant to the inherent jurisdiction of the court, in particular, O. 92 r. 4 of the Rules of Court 2012 ("ROC");

(ii) the application was the first of its kind and since the matter involved serious issues of torture, cruel, inhumane and degrading treatment of the prisoners, the appellant should be given his day in court;

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(iii) the application was correctly filed in the criminal court as it was filed in consequence of his imprisonment for a conviction under sub-s. 4(1) of the Sedition Act 1948;

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(iv) the court has the judicial powers to deal with his application for declaration; and

(v) the absence of the intitulement was a minor irregularity which could be cured.

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[5] In determining the preliminary objections, the learned Judicial Commissioner relied on art. 121(1) of the Federal Constitution which provides for the existence of the High Court in Malaya and the High Court in Sabah and Sarawak and their jurisdiction and powers and on s. 22 of the Courts of Judicature Act 1964 ("the CJA") in respect of the criminal jurisdiction of the High Court.

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[6] The learned Judicial Commissioner also adverted to sub-s. 25(2) of the CJA which provides for the additional powers of the High Court to issue to any person or authority directions, orders or writs of the nature of *habeas corpus*, *mandamus*, prohibition, *quo* warrants and *certiorari*, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them or for any purpose.

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[7] Having regard to the statutory provisions and the cases of *PP v. Kok Wah Kuan* [2007] 6 CLJ 341; [2008] 1 MLJ 1; *Teh Cheng Poh v. PP* [1978] 1 LNS 202; [1979] 1 MLJ 50 and *Loh Kooi Choon v. Government of Malaysia* [1975] 1 LNS 90; [1977] 2 MLJ 187, the learned Judicial Commissioner found that the High Court had no power to grant the reliefs sought by the appellant. Accordingly, the preliminary objection was upheld and the application was consequently dismissed. Aggrieved, the appellant appealed to this court.

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The Appeal

[8] When the appeal came up before us, learned DPP again raised a preliminary objection, this time on the grounds that:

(i) the appeal was incompetent; and

(ii) the appeal failed to fulfil the requirements of s. 50 of the CJA.

[9] Learned DPP submitted that the High Court was not seized with the jurisdiction to hear the application filed by the appellant because as conferred by the CJA, the jurisdiction and powers of the High Court are the original jurisdiction; appellate jurisdiction; supervisory jurisdiction; revisionary jurisdiction and inherent jurisdiction (see ss. 22, 26, 30, 31 and 35 of the CJA). The application filed by the appellant did not fall under any of the above jurisdiction. And if the High Court was not seized with jurisdiction, this court similarly was not seized with jurisdiction to hear the appeal. Put another way, since the High Court had no jurisdiction, the matter was a non-starter and the appeal cannot stand.

[10] Learned DPP had also highlighted the parties named as respondents in the appeal, who were other than the Public Prosecutor. They were:

(i) YAB Dato Sri Najib bin Tun Abdul Razak, Perdana Menteri Malaysia;

(ii) YAB Dato Seri Ahmad Zahid bin Hamidi, Menteri Dalam Negeri;

(iii) Dato Sri Zulkifli bin Omar, Ketua Pengarah Jabatan Penjara Malaysia;

(iv) Abdul Wahab bin Abdul Kassim, Pengarah Penjara Kajang;

(v) Peguam Negara Malaysia; and

(vi) Kerajaan Malaysia.

[11] By citing the Government of Malaysia as one of the respondents, learned DPP submitted that the application fell within the realm of a civil matter under s. 21 of the Government Proceedings Act 1956 (Revised 1988) (GPA) and being a civil matter, the appeal cannot be governed by s. 50 but by s. 67 of the CJA. Under s. 67, the appellant had to file in the record of appeal and the memorandum of appeal which obviously was not done in this instance.

[12] The appellant repeated his stance in the High Court that the application cannot be thrown out based on technicalities and that the High Court had the inherent powers to deal with the application. The appellant submitted that the application was premised on his criminal conviction, thus it originated from a criminal case. The appellant further submitted that the application was made for and on behalf of more than 4,000 other prisoners and the application if dismissed would give a licence to the prison authorities to do as they like.

Our Decision

[13] Having considered the submissions and the authorities, we found that the preliminary objection raised by the prosecution was not of mere technicalities but issues of law which go to the root of the jurisdiction of the court. In the circumstances, we upheld the preliminary objection and we dismissed the appeal. We now give our reasons.

Intitulement

[14] The appellant had submitted that the issue of intitulement was a minor irregularity which could be cured. We disagreed with the appellant. In *Cheow Chew Khoon v. Abdul Johari bin Abdul Rahman* [1995] 4 CLJ 127; [1995] 1 MLJ 457, Gopal Sri Ram JCA (as he then was) said at p. 142 (CLJ); p. 477 (MLJ):

> The plaintiff, as noted earlier, says that if one were to undertake a careful scrutiny of the originating summons and the affidavit in support, one would come to the conclusion that it is not an application made under O. 89. The summons does not, as I observed very early in this judgment, state any particular rule of court in its intitulement. Now, I think that that is not only wrong but plainly embarrassing. How, might one ask, is a defendant or the court to determine which rule of court the plaintiff is invoking unless he explicitly specifies it? If a defendant and the court should have to conduct a close examination of the supporting affidavit in each case in order to determine the particular jurisdiction or power that is being invoked by an originating summons or other originating process that requires an intitulement, then a plaintiff will be at liberty to shift from one rule to another or indeed from one statute to another as it pleases him without any warning whatsoever to his opponent or the court. It would make a mockery of the principle that there must be no surprise in civil litigation ...
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> In my judgment, this matter, which is a point of practice and procedure, is to be resolved by reference to the fundamental principle that a party must not take his opponent or the court by surprise. It is my opinion that an originating process requiring an intitulement must state, with sufficient particularity, either in its heading or in its body, the statute or rule of court under which the court is being moved; otherwise it would be an embarrassing pleading and be may be *(sic)* liable to be struck out, unless sooner amended.

[15] A similar issue was canvassed in *Ketua Pengarah Imigresen Malaysia lwn. Heng Peo* [2007] 2 CLJ 111; [2007] 3 MLJ 97 wherein Zulkefli Makinudin JCA (now CJM) said at p. 122 (CLJ); p. 105 (MLJ):

> [14] Sungguhpun salah satu daripada tajuk-tajuk perkara kepada permohonan tersebut ada menyatakan Kanun Tatacara Jenayah ("KTJ"), persoalannya adalah di bawah peruntukan mana KTJ ianya dibuat.

Sesuatu permohonan jenayah yang boleh dibuat adalah terhad kepada apa yang dibenarkan dipohon di bawah KTJ tersebut dan atas bidang perkara tertentu sahaja antara lainnya seperti berikut:

(i) permohonan untuk suatu bon kehadiran orang kena tuduh di mahkamah di bawah s. 49;

(ii) permohonan untuk suatu bon kehadiran pengadu dan saksi-saksi di bawah s. 118;

(iii) permohonan untuk mengemukakan harta benda atau dokumen di mahkamah di bawah s. 51;

(iv) prosedur permohonan oleh pihak polis berkenaan rampasan harta benda di bawah s. 413;

(v) permohonan untuk tahanan di bawah s. 117;

(vi) permohonan untuk suatu penggantungan penghakiman sementara menanti rayuan di bawah s. 311; dan

(vii) permohonan untuk suatu writ *habeas corpus* di bawah ss. 365 dan 366.

[15] Di dalam kes ini apa yang dapat dilihat daripada perintah atau relif yang dipohon oleh permohon adalah ianya tidak tergolong langsung dalam bidang perkara yang dibenarkan di bawah KTJ, tetapi ianya pada pandangan kami, sepatutnya dibuat dan dipohon di bawah undang-undang yang lain. Relif yang dipohon oleh pemohon adalah berbentuk satu perintah *mandamus* dan dalam hal perkara ini pemohon sepatutnya memulakan prosiding permohonan semakan kehakiman untuk relif tersebut melalui tatacara yang ditetapkan di bawah A. 53 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Mengikut peruntukan A. 53 k. 3 KMT pemohon hendaklah memperoleh kebenaran Mahkamah terlebih dahulu untuk suatu permohonan semakan kehakiman difailkan dan kehendak ini juga tidak dipatuhi oleh pemohon. Sekiranya tiada kebenaran terlebih dahulu diperoleh oleh pemohon dalam kes sekarang ini maka Mahkamah dianggap telah bertindak tanpa bidang kuasa dalam membenarkan pemohon untuk suatu perintah *mandamus* (sila lihat kes *Mersing Omnibus Co Sdn Bhd v. Minister of Labour and Manpower & Anor* [1983] 2 MLJ 541).

[16] Perintah *mandamus* juga boleh dipohon oleh pemohon terhadap pengkhidmat awam untuk melaksanakan sesuatu tindakan melalui kaedah permohonan yang diperuntukkan di bawah ss. 44 dan 45 Akta Relif Spesifik 1950 ('Akta 137'). Tiada kebenaran ('leave') diperoleh terlebih dahulu sebelum permohonan untuk relif atau remedinya dipohon melalui kaedah yang diperuntukkan di bawah ss. 44 dan 45 Akta 137 (sila lihat kes *Metro Pacific Sdn Bhd v. Ketua Pengarah Kesatuan Sekerja & Anor* [2001] 4 MLJ 616. Di dalam kes sekarang ini pemohon tidak berbuat demikian dan tidak ada menyatakan peruntukan berkenaan sebagai tajuk perkara kepada permohonan yang difailkan.

A [17] Kami berpendapat oleh kerana terdapat dua kaedah berlainan yang boleh digunakan oleh pemohon untuk memperolehi perintah *mandamus* terhadap pengkhidmat awam untuk melaksanakan sesuatu tindakan iaitu melalui peruntukan A. 53 KMT dan melalui peruntukan ss. 44 dan 45 Akta 137 maka pemohon hendaklah menyatakan dengan tepat dan jelas atas undang-undang yang mana pemohon bergantung dalam
B permohonan pemohon tersebut. Kegagalan pemohon berbuat demikian telah mengakibatkan YA Hakim Mahkamah Tinggi yang membicarakan kes ini bertindak tanpa bidang kuasa dan perintah yang diberi adalah salah di sisi undang-undang.

[16] The principle in *Cheow Chew Khoon (supra)* and *Heng Peo (supra)*
C applies squarely to the present appeal. We noted that while there was a reference to the CPC in the application in *Heng Peo (supra)*, here the application was absolutely silent either in the heading of the application or in its body as to the statute or the rule of court under which the application was made.

D **[17]** Further, it must be kept in mind that the application was filed as a miscellaneous criminal application and that the law governing criminal procedure is the CPC. As such, the appellant must conform to the provisions of the CPC in making the application, that is to say, the reliefs prayed for must fall within the matters allowed under the CPC. However, we found
E nothing in the CPC to support the application for the above reliefs.

[18] At this juncture, it is pertinent to highlight that the appellant was seeking for the reliefs of *mandamus* and declaration which reliefs are provided for under the Specific Relief Act 1950 (SRA). SRA pertains essentially to reliefs and remedies for civil action. And insofar as civil action
F is concerned, the definition in s. 3 of the CJA reads:

> a civil proceeding commenced by writ or in such other manner as is prescribed by rules of court, but does not include a criminal proceeding;

while sub-s. 21(1) of the GPA provides that:

G > Civil proceedings by or against the Federal Government shall be instituted by or against, as the case may be, the Government of Malaysia.

[19] Apart from the above, pursuant to art. 145(3) of the Federal Constitution and sub-s. 376(1) of the CPC, the Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal
H prosecutions and proceedings under the CPC. Hence, in criminal proceedings, the correct party to be cited would be the Public Prosecutor. The application, however, did not cite the Public Prosecutor as the respondent. Instead, the appellant cited the Government of Malaysia whereas as stipulated in sub-s. 21(1) of the GPA, the Government of
I Malaysia is only named as a party in civil proceedings.

[20] In the light of all the above, we were of the considered view that the application was a classic example of an embarrassing pleading which was liable to be struck out without hearing the merits.

Powers And Jurisdiction Of This Court

[21] The powers and jurisdiction of this court is provided for in art. 121(1B) of the Federal Constitution which reads:

> **Judicial power of the Federation**
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> 121. (1) ...
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> (IB) There shall be a court which shall be known as the Mahkamah Rayuan (Court of Appeal) and shall have its principal registry at such place as the Yang di-Pertuan Agong may determine, and the Court of Appeal shall have the following jurisdiction, that is to say:
>
> (a) jurisdiction to determine appeals from decisions of a High Court or a judge thereof (except decisions of High Court given by a registrar or other officer of the Court and appealable under federal law to a judge of the Court); and
>
> (b) such other jurisdiction as may be conferred by or under federal law.

[22] In dealing with the instant appeal, this court is also governed by s. 50 of the CJA which states:

> 50(1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court:
>
> (a) in the exercise of its original jurisdiction; and
>
> (b) in the exercise of its appellate or revisionary jurisdiction in respect of any criminal appeal decided by the Sessions Court.

[23] Due to the absence of any intitulement either in the heading or in the body of the application, it cannot be ascertained under which provision of the law was the application made in the High Court. Nonetheless, it was clear that the application was not made in the exercise of the High Court's appellate or revisionary jurisdiction in respect of any criminal appeal decided by the Sessions Court. This was because although the appellant did allude to his conviction and sentence by the Sessions Court for an offence under sub-s. 4(1)(c) of the Sedition Act 1948, this application had nothing to do with the decision of the Sessions Court. The appellant had exhausted his avenues in the High Court and in this court in respect of the sedition case and his sentence had been spent.

[24] What is left would be the original criminal jurisdiction of the High Court as provided in s. 22 of the CJA:

22(1) The High Court shall have jurisdiction to try:

(a) all offences committed:

(i) within its local jurisdiction;

(ii) on the high seas on board any ship or on any aircraft registered in Malaysia;

(iii) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft;

(iv) by any person on the high seas where the offence is piracy by the law of nations;

(b) offences under Chapters VI and VIA of the Penal Code [Act 574] and under any of the written laws specified in the Schedule to the Extra-Territorial Offences Act 1976 [Act 163], or offences under any other written law the commission of which is certified by the Attorney General to affect the security of Malaysia committed as the case may be,

(i) on the high seas on board any ship or on any aircraft registered in Malaysia;

(ii) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft;

(iii) by any citizen or any permanent resident in any place without and beyond the limits of Malaysia;

(iv) by any person against a citizen of Malaysia;

(v) by any person against property belonging to the Government of Malaysia or the Government of any State in Malaysia located outside Malaysia, including diplomatic or consular premises of Malaysia;

(vi) by any person to compel the Government of Malaysia or the Government of any State of Malaysia to do or refrain from doing any act;

(vii) by any stateless person who has his habitual residence in Malaysia;

(viii) by any person against or on board a fixed platform while it is located on the continental shelf of Malaysia; or

(ix) by any person who after the commission of the offence is present in Malaysia.

(2) The High Court may pass any sentence allowed by law.

[25] The application certainly did not relate to any of the offences stipulated in paras. (a) and (b) of s. 22. Hence, it cannot be said that it was filed pursuant to the original criminal jurisdiction of the High Court. It follows that the appeal did not fall under s. 50 of the CJA.

[26] Finally, the appellant had relied on O. 92 r. 4 of the ROC to argue that the High Court had the inherent jurisdiction to determine the application. We found the appellant's reliance on the ROC misconceived in view of O. 1 r. 2(2) of the ROC which states:

> These Rules do not have effect in relation to proceedings in respect of which rules have been made or may be made under any written law for the specific purpose of such proceedings or in relation to any criminal proceedings.

Conclusion

[27] Based on all the above, we agreed with learned DPP that there was no competent appeal before us. In the circumstances, we upheld the preliminary objection. The appeal was dismissed and the order of the High Court was affirmed.